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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-148.

KAISER ALUMINUM & CHEMICAL CORP. and
KAISER ALUMINUM & CHEMICAL SALES, INC.,
Petitioners,

v.

COLUMBIA METAL CULVERT CO., INC.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

RICHARD P. MCELROY,
WILLIAM H. ROBERTS,
Attorneys for Petitioners.

Of Counsel:
ROBERT L. PRICE,
300 Lakeside Drive,
Oakland, California. 94643

BLANK, ROME, KLAUS & COMISKY,
1100 Four Penn Center Plaza,
Philadelphia, Pennsylvania. 19103

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

The importance of granting certiorari in this case to settle the conflict on the fundamental questions involving the scope of the so-called "Intra-Enterprise Conspiracy" Theory of antitrust liability and the purported antitrust theory of "Price Squeeze" is not diminished by the Respondent's opposition to review by this Court.

I. The Circuits Are in Irreconcilable Conflict Regarding the Viability and Application of the So-Called "Intra-Enterprise Conspiracy" Theory.

The Petition points out that the lower courts have themselves repeatedly commented on the present state of confusion and conflict concerning the troublesome question of application of the Sherman Act conspiracy provisions to so-called "intra-enterprise" or "bathtub" conspiracies, where the alleged "co-conspirators" are only a corporation and its own wholly-owned subsidiary, which together constitute a single business entity. In an extended analysis of the "intra-enterprise conspiracy" theory and of this Court's prior decisions, the Court of Appeals for the Ninth Circuit in *Knutson v. Daily Review, Inc.*, 548 F. 2d 795 (9th Cir. 1976), said: "The heretofore unanswered question is what, if any, limits should be and can be drawn on Section 1 conspiracies in the separate incorporation situation." 548 F. 2d at 802. The Ninth Circuit pointedly characterized the conflict of the circuits on this important question, as follows (548 F. 2d at 802 n. 5):

> "The Court's suggestion in *Kiefer-Stewart* that commonly-owned firms who pretend to be competitors must act like competitors has created some confusion in the lower courts. The Fifth and Eighth Circuits have held that competition between the corporate units is not necessary for a finding of intraenterprise conspiracy. (*Battle v. Liberty Nat'l Life Ins. Co.* (5th Cir. 1974), 493 F. 2d 39, 44; *T. V. Signal Co. v.*

A. T. & T. (8th Cir. 1972) 462 F. 2d 1256, 1260). The Second and Third Circuits have refused to find an intraenterprise conspiracy when competition was lacking. (*Ark Dental Supply Co. v. Cavitron Corp.* (3d Cir. 1972) 461 F. 2d 1093, 1094-95, n. 1; *Beckman v. Walter Kidde & Co., Inc.* (E. D. N. Y. 1970) 316 F. Supp. 1321, 1325-26, *aff'd* (2d Cir. 1971) 451 F. 2d 593)."

Unquestionably, the Ninth Circuit is correct that the circuits are divided on this issue, as are the many other lower courts which have commented on the conflict and confusion which surround this controversial and important question. *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F. 2d 71, 82 (9th Cir. 1969) ("The Court has never indicated what, if any, are the limits of this doctrine."); *T. V. Signal Company of Aberdeen v. American Telephone & Telegraph Co.*, 462 F. 2d 1256, 1260 (8th Cir. 1972) ("[T]he extent of the intra-corporate conspiracy doctrine has not yet been delineated"); *International Railways v. United Brands, Inc.*, 532 F. 2d 231, 240 (2d Cir. 1976) (describing the issue as a "thicket" in which that court need not become "enmeshed" in that case); *Inter City Oil Co., Inc. v. Murphy Oil Corp.*, 1976-1 CCH Trade Cases ¶60,948 (D. Minn. 1976) ("The state of the law as to intra-enterprise conspiracies is unsettled"); *Joe Westbrook, Inc. v. Chrysler Corp.*, 419 F. Supp. 824, 843 (N. D. Ga. 1976) ("[T]he question whether competition is required among affiliated corporations to properly state a claim under Section 1 of the Sherman Act remains unanswered. The Supreme Court has provided no definitive answers."); *United States v. Arkansas Fuel Oil Corp.*, 1960 CCH Trade Cases ¶ 69,670 (N. D. Okla. 1960) (question "a rather difficult one" . . . "I don't think there is a controlling decision.").

Despite this unanimous analysis of the conflict by the lower courts, respondent attempts to deny that the circuits are divided. Ignoring *Beckman v. Walter Kidde & Co., Inc.*, 316 F. Supp. 1321 (E. D. N. Y. 1970), *aff'd*, 451 F. 2d 593 (2d Cir. 1971), respondent suggests that the decisions of the Court of Appeals for the Second Circuit are not in conflict with the decision of the Third Circuit in the case at bar. Respondent's treatment of *Beckman* and of *Syracuse Broadcasting Corporation v. Newhouse*, 319 F. 2d 683 (2d Cir. 1963), is completely at odds with numerous decisions in the lower courts in the Second Circuit which dispose summarily of the "intra-enterprise conspiracy" theory as applied to parent and non-competing subsidiary corporations. *See, e.g., duPont Glore Forgan Incorporated v. American Telephone & Telegraph Company*, 437 F. Supp. 1104 (S. D. N. Y. 1977) (citing *Syracuse Broadcasting* and *Beckman*); *Giant Paper & Film Corp. v. Albemarle Paper Co.*, 430 F. Supp. 981 (S. D. N. Y. 1977) (citing *Beckman*); *Diehl & Sons, Inc. v. International Harvester Co.*, 426 F. Supp. 110 (E. D. N. Y. 1976) (citing *Syracuse Broadcasting* and *Beckman*); *Sulmeyer v. Seven-Up Co.*, 411 F. Supp. 635 (S. D. N. Y. 1976); *I. Haas Trucking Corp. v. New York Fruit Auction Corp.*, 364 F. Supp. 868 (S. D. N. Y. 1973).

Moreover, respondent does not even so much as mention the recent decision of the Ninth Circuit in *Knutson v. Daily Review, Inc.*, 548 F. 2d 795 (9th Cir. 1976), *cert. denied*, 433 U. S. 910 (1977).

There can be no serious dispute that the circuits are divided on this issue.

II. This Case Raises Unresolved, Basic Issues Under the Federal Antitrust Laws Which Are of Fundamental Importance.

The clear conflict of the circuits aside, this case raises important, unresolved issues under the Sherman Act which

should be addressed by the Court at this time. The recent lower court decisions on the issue of the scope of the "intra-enterprise conspiracy" theory of Sherman Act liability have acknowledged the confusion and conflicts in the law and have expressly sought further guidance from this Court. The issue of the application of the conspiracy provisions of Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, to "conspiracies" consisting of a parent corporation and its own wholly-owned, non-competing subsidiary is one of the most important, unresolved questions in private enforcement of the antitrust laws.[1] Since antitrust litigation most commonly involves defendants in corporate form, this troublesome question is a frequently recurring one.

In the present uncertain state of the law, even lower courts inclined by common sense to reject the theory have expressed their reluctance to decide the issue at all. Instead, at great expense of judicial time, the uncertainty of the law has resulted in expensive and protracted trials of antitrust claims founded upon a controversial theory of Sherman Act liability repugnant to common sense, a theory which has been rejected by authorities on the antitrust laws and repudiated by the Antitrust Division of the Justice Department. For example, in *Joe Westbrook, Inc. v. Chrysler Corp.*, 419 F. Supp. 824, 843 (N. D. Ga. 1976), the district court denied a motion for summary judgment on the basis of the uncertainty in the law: "The question is presently before the Court on a motion for summary judgment. Set against the uncertainty in the law on this subject, the Court finds that resolution of the issue is best deferred until a complete disclosure of the facts, motives, and effects of any agreement between the defendants is revealed."

1. As noted in the Petition, the Department of Justice had repudiated the doctrine as it was applied by the Third Circuit below.

This phenomenon, which recurs in the present case where the Third Circuit would reverse a directed verdict for defendants but has furnished no meaningful guidance to the district court as to the scope of this so-called "intra-enterprise conspiracy" theory,[2] is a recipe for judicial backlog, clogging the lower courts with time-consuming trials of meritless antitrust claims.

2. Respondent has endorsed this procedure asserting that it is a reason for denying review and citing *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U. S. 251 (1916) and *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R. R.*, 389 U. S. 327 (1967). But the certiorari practice of the Court has not been so inflexible or short-sighted. It is well-established that where "review is fundamental to the further conduct of the case" and the case otherwise meets the criteria for certiorari, review is appropriate. *United States v. General Motors Corp.*, 323 U. S. 373, 377 (1945); *Land v. Dollar*, 330 U. S. 731, 734 n. 2 (1947); *Larson v. Domestic & Foreign Commerce Corporation*, 337 U. S. 682, 685 n. 3 (1949). Especially in antitrust cases, where prolonged trials are customary and review is, as here, frequently "fundamental to the further conduct of the case," the Court has given effect to this rule and granted review. *E.g., United States v. U. S. Gypsum Company*, No. 76-1590, — U. S. — (Opinion filed June 29, 1978) (granted notwithstanding the Third Circuit's vacatur of judgment and remand for new trial and respondents' issue of "lack of finality." *Respondents' Joint Brief in Opposition*, at 18); *Pfizer Inc. v. India*, 434 U. S. 308 (1978) (certiorari granted after 28 U. S. C. § 1292(b) certification for interlocutory appeal to and decision by Eight Circuit) *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U. S. 36 (1977) (certiorari granted although Ninth Circuit reversed and remanded for new trial of plaintiffs' claims regarding "location clauses"); *Illinois Brick Co. v. Illinois*, 431 U. S. 720 (1977) (certiorari granted although Seventh Circuit reversed and remanded for trial of antitrust claims of indirect purchasers); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477 (1977) (certiorari granted although Third Circuit remanded for new trial of merger damage claims); *Abbott Laboratories v. Portland Retail Druggists Assn., Inc.*, 425 U. S. 1 (1976) (certiorari granted although Ninth Circuit vacated summary judgment and remanded for trial of Robinson-Patman Act claims); *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U. S. 186 (1974) (certiorari granted after 28 U. S. C. § 1292(b) certification for interlocutory appeal to and decision by Ninth Circuit).

The important issue of Sherman Act liability for a "Price Squeeze" has never before been addressed by this Court. This phenomenon was analyzed in Judge Learned Hand's classic decision in *United States v. Aluminum Company of America*, 148 F. 2d 416 (2d Cir. 1945) ("Alcoa"). The question would have been before this Court in *Alcoa;* however, because of recusals, this Court was unable to muster a quorum, and the Circuit Court of Appeals for the Second Circuit heard the appeal by virtue of a special statute, now 28 U. S. C. § 2109. The underlying issue of the proper interpretation and scope of the "Price Squeeze" doctrine is a fundamental question of antitrust law having recurring application to many basic industries, such as the steel and aluminum industries, which are characterized by the vertical integration of major producers and by the presence of smaller fabricators which manufacture discrete finished products. This case presents the important question of the antitrust analysis of the "Price Squeeze".

CONCLUSION.

For each of the foregoing reasons, petitioners respectfully submit that certiorari should be granted to review the judgment of the Court of Appeals for the Third Circuit.

Respectfully,

RICHARD P. MCELROY,
WILLIAM H. ROBERTS,
Attorneys for Kaiser Aluminum & Chemical Corporation and Kaiser Aluminum & Chemical Sales Inc., Petitioners.

Of Counsel:
ROBERT L. PRICE
300 Lakeside Drive
Oakland, California 94643

BLANK, ROME, KLAUS & COMISKY
1100 Four Penn Center Plaza
Philadelphia, Pennsylvania 19103